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May 31, 2013

Via Electronic Mail (bbateman@baaqmd.gov)

Mr. Brian Bateman
Bay Area Air Quality Management District
939 Ellis Street
San Francisco, CA 94109

Re: Comments on Legal Issues Raised by Proposed Regulation 12-15 – Refinery Emissions Tracking Rule

Dear Mr. Bateman:

We have been retained by the Western States Petroleum Association ("WSPA") to provide initial comments on our view of potential legal issues raised by proposed Regulation 12-15. These comments supplement the comments provided to you in the letter from Guy Bjerke, dated May 31, 2013.

Air districts have authority to control air pollution from stationary sources (see, e.g., Health and Safety Code § 39002), and the courts have agreed that rules requiring reductions in existing emissions are authorized by law. However, nothing in state law gives a district the authority to specify the raw materials that are used by a refinery or other industrial facility when the facility otherwise complies with all applicable emission control requirements. Hence, any aspect of the proposed rule that would purport to restrict the crude slate used by a refinery would exceed the district's authority.

As described in the District's FAQ on the proposed rule, Regulation 12-15 is being developed to address a perceived problem that *may* occur. This is not a sound scientific basis for imposing a rule, nor is it within the District's legal mandate for controlling air pollution in the Bay Area. The District is specifically charged with "adopt[ing] and enforce[ing] rules and regulations to achieve and maintain the state and federal ambient air quality standards[.]" Health & Safety Code § 40001(a). But prior to adopting any rule or regulation to accomplish that goal, the District must "determine that there is a problem that the proposed rule or regulation will alleviate

and that the rule or regulation will promote the attainment or maintenance of state or federal ambient air quality standards[.]" Health & Safety Code § 40001(c). The District acknowledges in its own FAQs that it has not made such a finding here. Indeed, Regulation 12-15 serves as a perfect example as to why Section 40001(c) is in place, which is to ensure that the District rules are well-targeted and will result in measurable improvements in air quality. Proposed Regulation 12-15, in contrast to Section 40001(c)'s mandate, will be burdensome for the District to administer and for the refineries to interpret and follow and will not result in any clear air quality benefits for Bay Area residents

Just as the District is bound to identify real and pressing air quality problems and to tailor its rules to address them, it is also required to do so in a cost-effective manner (calculated in dollars per ton of emissions reduced). See Health & Safety Code § 40920.6. But according to the District's own description of the rule, Regulation 12-15 will not do anything to reduce existing emissions from Bay Area refineries; rather, it will simply create a cap to maintain the status quo. Plainly, Regulation 12-15 is not properly targeted to realize real emissions benefits for the Bay Area. At the same time, it is imposing new and additional costs on both the District and Bay Area petroleum refiners. On its face, therefore, the proposed rule fails any cost-effectiveness criteria. Moreover, with no anticipated emission reductions, it's not clear how the District can meet its statutory obligation to calculate the rule's cost-effectiveness. While the proposed rule does contemplate future emissions reductions through its "emission reduction plan" requirement that kicks in upon an significant increase in emissions over the baseline, the rule, as proposed, establishes no clear guidelines for these "plans". It merely forecasts the publication of informal guidance documents from the District on the subject. Without any specific emission control requirements in the rule, the District cannot evaluate whether the rule is technologically feasible, and, therefore, cannot satisfy its obligations under Section 40920.6.

The proposed rule doesn't account for emissions increases from new projects, particularly those that trigger emission offset requirements under Regulation 2, Rule 2. The proposed rule would be inconsistent with new project permitting and offset requirements under District rules if any refinery that implemented a permitted project that increased emissions by more than the proposed trigger levels would then have to reduce emissions back to the baseline within two years, even if emission offsets had been provided to mitigate the emission increase. For this reason, the proposed rule may also conflict with the statutory requirements for permit programs specified in the Health and Safety Code, and with the statutory and regulatory requirements for permit programs specified in the Clean Air Act and EPA regulations. In order to avoid these issues, the rule must specifically address how it interacts with the District's existing permitting rules in Regulation 2.

The proposed rule is also inconsistent with existing permits. Many refinery permits have throughput or mass emission limits that are higher than actual current throughput or emissions, and that are also higher than the highest throughput and/or emissions that occurred during the years that may be used to establish an emissions baseline for purposes of the proposed rule. In many instances, emission offsets were provided, at significant cost, in connection with establishing those limits. Since NSR and PSD permit limits are often established to provide operational flexibility in terms of throughput and fired duty, it is very possible that these existing permit limits are higher than the throughput or emissions that occurred in recent years, i.e., the years that the District proposes to use to set the facility-wide "baselines" in Regulation 12-15. By capping emissions at the baseline, Regulation 12-15 essentially de-rates the refineries by establishing an arbitrary site-wide limit well below emissions levels that were permitted and approved by the District. By requiring that refinery emissions remain within the baseline levels identified in accordance with the draft rule, the proposed rule is inconsistent with existing permit rules and permits that allow higher emissions rates. These proposed restrictions are also inconsistent with California's "vested rights doctrine", where a permittee's substantial use of a government-issued development permit causes the permit to become vested (i.e., the permitting agency cannot alter or rescind the permit). See, e.g., *Avco Community Developers v. South Coast Regional Commission*, 17 Cal. 3d 785, 791 (1976). As proposed, Regulation 12-15's baseline emission cap would effectively rescind the refineries' current operating limits in violation of their vested rights in those permits.

Emission inventories and air monitoring are key elements of the rule, as they provide the basis for determining whether a refinery has an emission increase that exceeds the rule's proposed trigger levels, and specify how a refinery must develop and deploy a local monitoring system. The refineries need to see these provisions to understand exactly what Regulation 12-15 would entail. The proposed rule would delegate to District staff the authority and obligation to develop and adopt guidelines for refinery emission inventories and air monitoring plans. However, California law assigns rulemaking authority to the District Board, not to the staff. Given the importance of these provisions to the rule, their adoption as guidance by staff rather than as part of the rule would likely constitute an unlawful rulemaking.

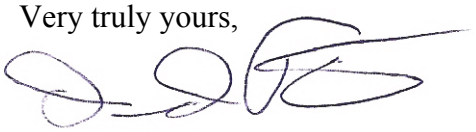
As structured, the proposed rule would provide that any increase of PM 2.5, TACs and CO would exceed the trigger level that would require preparation and implementation of an emission reduction plan, unless the refinery prepared a modeling demonstration meeting specified requirements. However, the modeling demonstration would have to include background levels of pollution that the refinery is not responsible for. As a result, the background pollution levels could cause the refinery to be required to reduce emissions through an emission reduction plan even if the refinery emissions do not cause a health risk. We believe that this approach is

arbitrary and capricious, because of its over-reliance on background levels of pollution rather than assessing the impacts of any actual emission increases from the refinery.

Finally, the proposed rule should be internally consistent. For example, the proposed rule would exclude certain accidental release emissions from a refinery's baseline, but would include those same emissions in the refinery's ongoing annual emissions inventory. Accidental release emissions should either be considered in the rule or not, but should not count for one purpose and not for another. We believe that excluding accidental release emissions from a refinery's baseline but requiring that those emissions be considered in the annual emissions inventory is arbitrary and capricious.

WSPA appreciates your consideration of these comments. If you have any questions, please feel free to contact me, or Guy Bjerke at 925-826-5354.

Very truly yours,



David R. Farabee

Enclosure

cc: Mr. Guy Bjerke